Statement of Commissioner Paul Smith on the County's New Prayer Policy in Light of the Recent Ruling by the Fourth Circuit in *Joyner v. Forsyth County*

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On July 29, 2011, the Fourth Circuit Court of Appeals issued its ruling in the case of *Joyner v. Forsyth County, NC*, 2011 U.S. App. LEXIS 15670. This ruling struck down the legislative prayer policy of the Forsyth County Board of Commissioners, which policy provided a time for prayer at the beginning of its Board meetings and which did not regulate the content of the prayers that would be offered. When Janet Joyner sought an injunction to prevent the Board from continuing this policy, the federal district court granted the injunction, and the Fourth Circuit affirmed this decision.

The relevance of this case to Frederick County is that the Forsyth County prayer policy is similar to the policy that I recommended for our BOCC to enact. A majority of our BOCC rejected my proposal and enacted a different policy—a policy that requires our legislative prayers to be non-sectarian prayers that do not mention the name of Jesus Christ or of any other specific deity. On the one hand, the Fourth Circuit's ruling in *Joyner* confirms that our new County prayer policy is okay—for now. But the *Joyner* ruling appears to conflict with a decision of the Eleventh Circuit in the *Pelphrey* case. This creates a conflict among the circuits, setting a stage for the U. S. Supreme Court to address this issue.

The new Frederick County prayer policy is unconstitutional, in my opinion. The majority opinion in the *Joyner* case would dispute this. But for the following reasons, I submit that our legislative prayer policy violates the Establishment Clause of the First Amendment, and therefore our policy should be changed.

The Frederick County legislative prayer policy prohibits anyone from praying in the name of Jesus and prohibits the mentioning of the name of Jesus or another specific god in the prayer. This specifically gives preference to one religious denomination over another, which violates the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989).

The Frederick County legislative prayer policy "establishes" one brand of prayer and specifically prohibits some prayers based upon the content of the prayers. This is a blatant violation of the plain meaning of the language in the First Amendment which states: "Congress [and now the States, too,] shall make no law respecting the establishment of religion." The County legislative prayer policy is a "law" that establishes a governmental prayer that prohibits even the mention of the name Jesus Christ, which establishes an anti-Christian prayer policy.

The Frederick County legislative prayer policy that requires "non sectarian" prayers is based upon the flawed reasoning that the establishment of a "nonsectarian" prayer does not violate the Establishment Clause. There is no logical basis for this conclusion. This is no more

logical than to say that the government can require that no prayers can be made to any god. Whether the government prohibits all prayers or only prayers addressed to certain gods, the defect remains the same—and government should not be dictating to whom we pray, nor should it be dictating the content of prayers. Those who cannot understand that the Establishment Clause prohibits such government control should take the time to read the First Amendment and consider the plain meaning of its first clause.

In *Joyner*, the majority interpreted the Supreme Court case of *Marsh v. Chambers*, 463 U.S. 783 (1983) to mean that any legislative prayers must be "nonsectarian." This is a gross misreading of *Marsh*.

In *Joyner*, the majority decried the fact that in a community that was predominantly Christian, that the First Amendment would prohibit that community from having prayers that predominantly mentioned the name of Jesus Christ. The majority said that such a practice would be "divisive," "offensive" and would result in "ostracism and marginalization" of those citizens that were not Christian. This line of reasoning is both logically flawed and entirely out of step with the principles of tolerance and respect for diversity that has long been a foundation of American society. Basically, the Fourth Circuit is saying that even if a community is 99% Christian, then it cannot allow someone to pray at the beginning of its meeting in the name of Jesus because that might offend someone in the community. This approach is an aggressive attempt to turn legislative prayer into something that it is not; this is an attack on prayer that (as the dissent stated in *Joyner*) "treats prayer agnostically."

While the majority in Joyner does not agree with my views, at least the majority admitted that it distinguished "legislative prayer" cases from typical "Establishment Clause" cases (at p. 4). It is true that the majority did not treat legislative prayer as it would other Establishment Clause cases. But in my opinion, the Fourth Circuit erred in giving this disparate treatment. There is no basis to support the majority's decision to not decide the legislative prayer issue under the normal Establishment Clause principles. If they had done this, they would have had to adopt the view of the dissent.

At some point the United States Supreme Court will address the issue that was looked at in *Joyner*, and which is the issue present in the Frederick County legislative prayer policy. If a legislative body is allowed to have prayer at the beginning of its meetings, then the one praying must be allowed to pray as he/she desires. Any policy that restricts the words that one prays and the individuals to whom one can pray, or the names of those in whom a prayer may be made—such a policy necessarily ESTABLISHES and advances some religion and disestablishes at least one other religion. If the Establishment Clause means anything, it must certainly prohibit the government from proscribing how one may or may not pray. When the Supreme Court looks at the legislative prayer issues raised in *Joyner* or in the Frederick County policy, I predict that the current Frederick County prayer policy will be struck down as unconstitutional—as a violation of the Establishment Clause of the First Amendment.